

NTSB Order No. EM-188

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 5th day of December, 2000

KEVIN SPENCE DeGOUGH,
Appellant.

Docket ME-168

Appellant, by counsel, seeks review of a decision of the Commandant (Appeal No. 2612, dated October 5, 1999) affirming a decision entered by Coast Guard Administrative Law Judge Thomas E. P. McElligott on September 15, 1998, following hearings that concluded on June 30, 1998.¹ The law judge sustained a charge

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alleging that appellant was a user of a dangerous drug (to wit, cocaine) and revoked the appellant's Merchant Mariner's License (No. 799032). Because we conclude that appellant has not raised any issue appropriate for Board review, his appeal from the Commandant's affirmance of the law judge's decision and order will be denied.

The appellant tested positive for cocaine as a result of a random drug screening test he was directed to take by his maritime employer, pursuant to U.S. Department of Transportation ("DOT") regulations.² His appeal to the Board, like his appeal to the Commandant, centers on his contention that his constitutional rights were abridged by the use of single sample testing rather than split sample testing. He maintains, in effect, that split sample testing allows for independent verification of test results that is not available with single sample testing. Since DOT regulations require employers whose workers are subject to the drug testing rules of other agencies (e.g., Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration, and the Federal Aviation Administration) to use split sample testing,³ the provision in those regulations that allows employers whose workers must follow Coast Guard rules to use either testing procedure denies, in appellant's view, equal protection of the

²See 49 CFR Part 40, Procedures for Transportation Workplace Drug Testing Programs.

³See 49 C.F.R. § 40.25(f)(10)(i)(B).

law to individuals such as him.⁴ We express no view as to the merits of appellant's argument.

Challenges to the constitutionality of DOT's regulations, including those promulgated for the drug testing of workers in the transportation industry, fall beyond the scope of the Board's review authority as an administrative agency. See, e.g., Commandant v. Raymond, NTSB Order EM-175, at 4 (1994)(Board cannot review claim that chain-of-custody provisions in DOT drug testing regulations is constitutionally inadequate).⁵

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is denied; and
2. The Commandant's decision affirming the decision and order of the law judge is affirmed.

HALL, Acting Chairman, HAMMERSCHMIDT, GOGLIA, BLACK, and CARMODY, Members of the Board, concurred in the above opinion and order.

⁴See 49 C.F.R. § 40.25(f)(10)(i)(A).

⁵For the same reason, we cannot entertain appellant's claim that the Coast Guard's proof was insufficient to support the charge of drug use, for it rests on the proposition that the risk of unreliability inherent in the method of testing that appellant's employer utilized is too high to allow it to be considered substantial evidence. Since, however, the single sample testing methodology was authorized by DOT regulations, we are not free to conclude, without some showing, not made here, of unreliability unrelated to the testing protocol, that it could not produce results reliable enough to support the Coast Guard's license action.